CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 173

PORT GARDNER INVESTMENT COMPANY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JULY 30, 1926

(31,334)

(31,334)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 611

PORT GARDNER INVESTMENT COMPANY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1925

[fol. 1] **IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT**

No. 4501

PORT GARDNER INVESTMENT COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Certificate of United States Circuit Court of Appeals for the Ninth Circuit Certifying Certain Questions of Propositions of Law to the Supreme Court of the United States under Section 239 of the Judicial Code.

Before Hunt, Rudkin, and McCamant, Circuit Judges

STATEMENT OF FACTS

This action came to the Circuit Court of Appeals for the Ninth Circuit upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division, upon a decree in favor of the United States ordering a certain Jewett Sedan automobile forfeited.

On August 9, 1924, prohibition agents seized one Jewett Sedan automobile in Snohomish County, Washington, and within the jurisdiction of the District Court of the United States for the Western District of Washington, Northern Division. The automobile was being driven by one Luther L. Neadeau, who had purchased same under a conditional sales contract retaining title in the vendor. In the automobile was found a five gallon keg of illicit liquor, commonly known as "moonshine whiskey," on which no tax had been paid.

Neadeau was charged with possession and transportation of intoxicating liquors in violation of the National Prohibition Act, pleaded guilty to both charges, and was sentenced to pay a fine.

[fol. 2] The government sought to forfeit the automobile under Section 3450 of the United States Revised Statutes on the ground that the same was being used by said Neadeau in the removal and for the deposit and concealment of large quantities of distilled spirits, to wit, moonshine whiskey, with the intent to defraud the United States of the tax thereon. The plaintiff in error, assignee of the vendor and owner of the conditional sales contract and of all rights of the vendor in and to the automobile, intervened in the action, filed an answer and a claim to the automobile, and asked protection of its interest therein.

At the trial a stipulation was filed in which it was agreed that the plaintiff in error holds title to the automobile under a valid conditional sales contract, and that there remains unpaid a balance of Seven hundred ninety-four and 08/100 Dollars ($794.08), and that neither plaintiff in error nor its assignor, the vendor of the car, had knowledge or notice prior to the time the car was seized that it was being used or was intended to be used in any illegal manner.

The driver of the car was not a manufacturer of the liquor and was not shown to be connected in any way with the manufacture of the same, but had purchased it along the public highway and had just arrived at his home with the same when he was arrested and the car seized.

In the State of Washington there is in effect what is commonly known as the "bone-dry law," making it unlawful for any person to have in his possession intoxicating liquors, and the Government Agents testify that a permit will not be granted to anyone to manufacture or have in his possession such liquor in a "bone-dry" state such as the State of Washington, and that there is no place in the State of Washington where intoxicating liquor can be legally kept without the tax thereon being paid, and that there is no distillery warehouse, bonded warehouse or other place in the State of Washing-
[fol. 3] ton where intoxicating liquor can be legally kept either without the tax thereon having been paid or otherwise.

Questions Certified

The questions of law concerning which the United States Circuit Court of Appeals for the Ninth Circuit desires instructions and advice of the United States Supreme Court are as follows:

1. Is Section 3450 of the Revised Statutes of the United States in force and effect in so far as it provides for the forfeiture of automobiles or other vehicles where the same are used or are being used for the transportation of intoxicating liquor?

2. Do the provisions of Section 3450 of the Revised Statutes of the United States authorize the forfeiture of the interest of a conditional vendor reserving title to a conveyance who is free from knowledge, blame or negligence in the premises where the goods or commodities concerned consist of intoxicating liquors illicitly manufactured or imported, a case under the Section referred to being made out in other respects.

3. Does Section 3450 of the Revised Statutes authorize the forfeiture of taxable goods or commodities and the carriage or other conveyance used in the removal or for the deposit or concealment thereof where the only removal, deposit or concealment with intent to defraud the United States of such tax that can be shown is the mere movement of such goods on a trip other than from the original point of importation, manufacturing or bonded warehousing.

4. In the State of Washington, where there is no place where intoxicating liquor can be legally kept without the tax thereon being paid or otherwise, can an automobile be said to have been guilty of being used for the removal, deposit or concealment of intoxicating liquor with intent to defraud the government of the tax imposed thereon where it is merely shown that the liquor is found in the automobile and that no tax thereon has been paid.

[fol. 4] 5. Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the government to proceed under Section 26 of that Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?

6. Is there any tax on intoxicating liquor illicitly manufactured as the word tax is meant and used in Section 3456 of the Revised Statutes of the United States or are the so-called taxes now claimed to be collectable merely penalties?

William H. Hunt, F. F. H. Rudkin, Wallace McCamant, U. S. Circuit Judges.

Dated San Francisco, California, July 6, 1925.

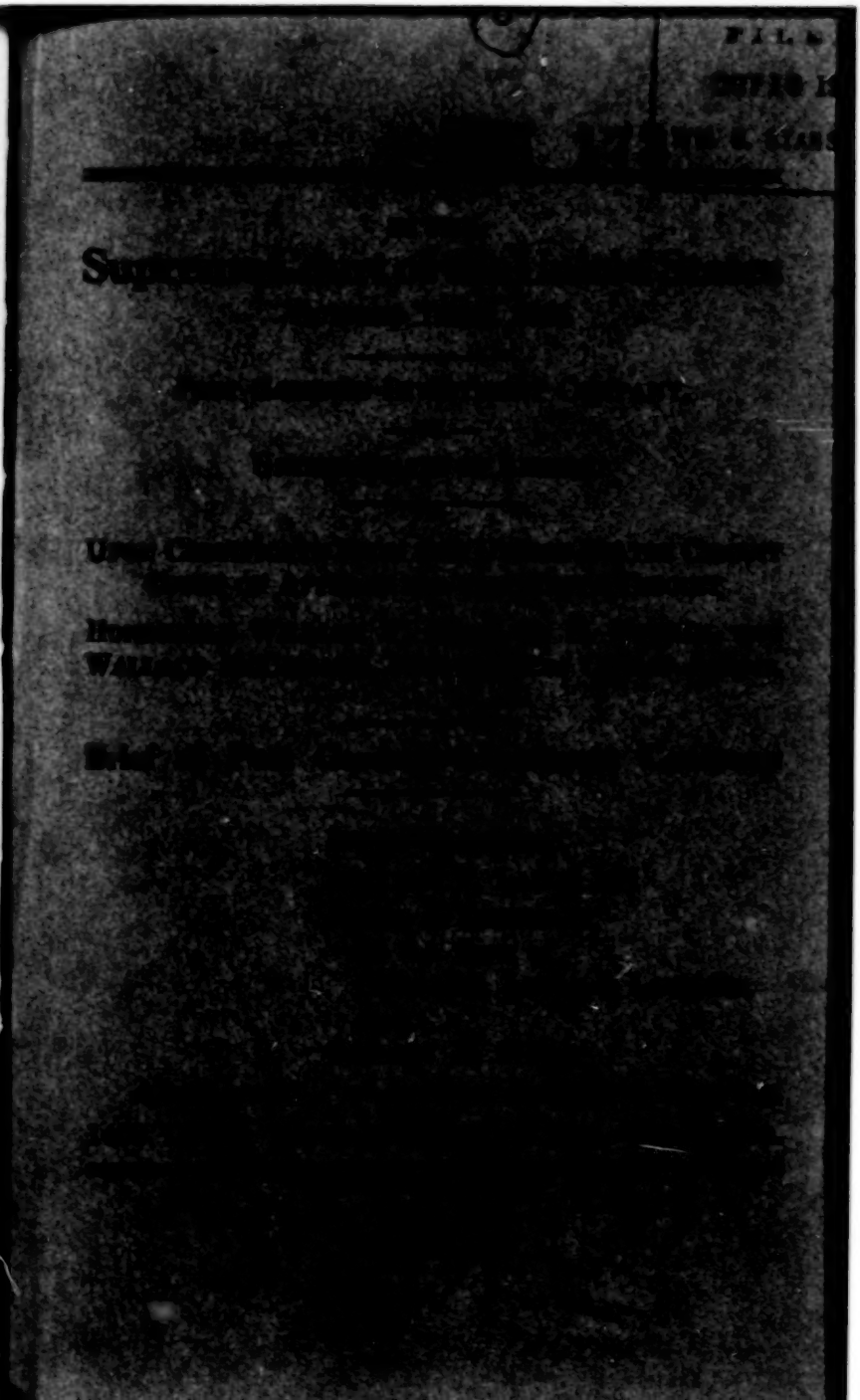
(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed July 6, 1925. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

CLERK'S CERTIFICATE

A true copy.
Attest: July 6, 1925.
F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.
(Seal of the United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 5] [Endorsed:] Form No. 680. No. 4501. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Port Gardner Investment Co., Plaintiff in Error, vs. United States of America, Defendant in Error. Certified copy of certificate of United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code.

Endorsed on cover: File No. 31,334. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 611. Port Gardner Investment Company vs. The United States of America. (Certificate.) Filed July 20th, 1925. File No. 31,334.



No. 611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

PORT GARDNER INVESTMENT COMPANY,

—VS.—

UNITED STATES OF AMERICA

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HONORABLE WILLIAM T. HUNT, R. H. RUDKIN, and WALLACE MCCAMANT, *United States Circuit Judges.*

Brief of Port Gardner Investment Company

LOREN GRINSTEAD,
WILLIAM T. LAUBE and
JAMES A. LAUGHLIN,
of the firm of
Grinstead, Laube & Laughlin,
and
THOMAS E. DAVIS,
Attorneys for Port Gardner Investment Company.
1408 Dexter Horton Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

PORT GARDNER INVESTMENT COMPANY,
—VS.—
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UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HONORABLE WILLIAM T. HUNT, R. H. RUDKIN, and WALLACE MCCAMANT, *United States Circuit Judges.*

Brief of Port Gardner Investment Company

This case comes before this Court upon the Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, and we copy herewith the Statement of Facts and Questions certified by that Court:

> "This action came to the Circuit Court of Appeals for the Ninth Circuit upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division, upon a decree in favor of the United States ordering a certain Jewett Sedan automobile forfeited.
>
> On August 9, 1924, prohibition agents seized one Jewett Sedan automobile in Snohomish

County, Washington, and within the jurisdiction of the District Court of the United States for the Western District of Washington, Northern Division. The automobile was being driven by one Luther L. Neadeau, who had purchased same under a conditional sales contract retaining title in the vendor. In the automobile was found a five gallon keg of illicit liquor, commonly known as "moonshine whiskey," on which no tax had been paid.

Neadeau was charged with possession and transportation of intoxicating liquors in violation of the National Prohibition Act, pleaded guilty to both charges, and was sentenced to pay a fine.

The government sought to forfeit the automobile under Section 3450 of the United States Revised Statutes on the ground that the same was being used by said Neadeau in the removal and for the deposit and concealment of large quantities of distilled spirits, to-wit, moonshine whiskey, with the intent to defraud the United States of the tax thereon. The plaintiff in error, assignee of the vendor and the owner of the conditional sales contract and of all rights of the vendor in and to the automobile, intervened in the action, filed an answer and a claim to the automobile, and asked protection of its interest therein.

At the trial a stipulation was filed in which it was agreed that the plaintiff in error holds

title to the automobile under a valid conditional sales contract, and that there remains unpaid a balance of Seven hundred ninety-four and 08/100 Dollars ($794.08), and that neither plaintiff in error nor its assignor, the vendor of the car, had knowledge or notice prior to the time the car was seized that it was being used or was intended to be used in any illegal manner.

The driver of the car was not a manufacturer of the liquor and was not shown to be connected in any way with the manufacture of the same, but had purchased it along the public highway and had just arrived at his home with the same when he was arrested and the car seized.

In the State of Washington there is in effect what is commonly known as the "bone-dry law," making it unlawful for any person to have in his possession intoxicating liquors, and the Government agents testify that a permit will not be granted to anyone to manufacture or have in his possession such liquor in a "bone-dry" state such as the State of Washington, and that there is no place in the State of Washington where intoxicating liquor can be legally kept without the tax thereon being paid, and that there is no distillery warehouse, bonded warehouse or other place in the State of Washington where intoxicating liquor can be legally kept either without the tax thereon having been paid or otherwise.

The questions of law concerning which the

United States Circuit Court of Appeals for the Ninth Circuit desires instructions and advice of the United States Supreme Court are as follows:

1. Is Section 3450 of the Revised Statutes of the United States in force and effect in so far as it provides for the forfeiture of automobiles or other vehicles where the same are used or are being used for the transportation of intoxicating liquor?

2. Do the provisions of Section 3450 of the Revised Statutes of the United States authorize the forfeiture of the interest of a conditional vendor reserving title to a conveyance who is free from knowledge, blame or negligence in the premises where the goods or commodities concerned consist of intoxicating liquors illicitly manufactured or imported, a case under the Section referred to being made out in other respects?

3. Does Section 3450 of the Revised Statutes authorize the forfeiture of taxable goods or commodities and the carriage or other conveyance used in the removal or for the deposit or concealment thereof where the only removal, deposit or concealment with intent to defraud the United States of such tax that can be shown is the mere movement of such goods on a trip other than from the original point of importation, manufacturing or bonded warehousing?

4. In the State of Washington, where there is

no place where intoxicating liquor can be legally kept without the tax thereon being paid or otherwise, can an automobile be said to have been guilty of being used for the removal, deposit or concealment of intoxicating liquor with intent to defraud the government of the tax imposed thereon where it is merely shown that the liquor is found in the automobile and that no tax thereon has been paid?

5. Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the government to proceed under Section 26 of that Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?

6. Is there any tax on intoxicating liquor illicitly manufactured as the word tax is meant and used in Section 3450 of the Revised Statutes of the United States or are the so-called taxes now claimed to be collectable merely penalties?"

As shown by the questions propounded by that Court, this case involves the construction of Section 3450 of the Revised Statutes of the United States, and a consideration of that section, in the light of the subsequent National Prohibition Act and the Amendment thereto, commonly known as the Willis-Campbell Act, or Supplemental Act, of November 23, 1921. In order to arrive at a correct solution of the problems presented by the Certificate from the Ninth Circuit, it is advisable and necessary to consider the statutes

in *pari materia* dealing with the taxation of intoxicating liquors, as Section 3450 R. S. is a statute enacted in aid of the Internal Revenue Statutes.

The Internal Revenue Statutes dealing with the regulation of the manufacture and distribution of intoxicating liquors, and the taxation thereof, remained practically unchanged from 1866-67-68, when they were enacted, until changed by the National Prohibition Act. The sections of the Revised Statutes which we deem material are as follows:

> R.S. 3251. There shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of seventy cents on each proof-gallon, to be paid by the distiller, owner, or person having possession thereof before removal from the distillery warehouse * * * Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.
>
> R.S. 3253. The tax upon any distilled spirits, removed from the place where they were dis-

tilled and not deposited in bonded warehouse as required by law, shall, at any time, when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

R.S. 3256. Whenever any person evades, or attempts to evade, the payment of the tax on any distilled spirits, in any manner whatever, he shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded.

R.S. 3257. Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling-apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

R.S. 3271. Every Distiller shall provide, at his own expense, a warehouse, to be situated on

and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner.

R.S. 3280. It shall not be lawful for any distiller to commence or to continue the business of distilling, until he has given the bond required by law, and complied with the provisions of law relating to the registration and survey of distilleries, * * *.

R. S. 3296. Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from

any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

R. S. 3450. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing,

or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

The material portions of the National Prohibition Act, and the Supplemental Act, are as follows:

Section 26, Title II. "When the commissioner, his assistant, inspectors, or any other officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty

to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle, team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. * * * The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fees for seizure, and the costs of the sale, shall pay all liens, according to their priorities, which are established by intervention or otherwise at said hearing or in any other proceeding brought for said purposes, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor."

Section 35, Title II, provides:

"All provisions of the law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed

upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

Section 5 of the Act of November 23, 1921 (42 Stat. 222):

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but, if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a

bar to prosecution therefor under the other. All taxes and tax penalties provided for in Section 35, Title II, of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor."

Section 600 (a) of the Act of February 24, 1919, (40 Stat. 1057):

"There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing laws."

Section 600, Act of November 23, 1921 (42 Stat. 285). Amending the last quoted Section, provides:

"That subdivision (a) of section 600 of the Revenue Act of 1918, is amended by striking out the period at the end thereof and inserting a colon and the following: 'Provided, That on all dis-

tilled spirits on which tax is paid at the non-beverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion.' "

I

Is Section 3450 of the Revised Statutes of the United States in Force and Effect in so Far as it Provides for the Forfeiture of Automobiles or Other Vehicles Where the Same Are Used or Are Being Used for the Transportation of Intoxicating Liquor?

Section 3450 R. S. was enacted as an act in aid of the general revenue statutes of the United States, and it was not in any sense an act dealing with the traffic in intoxicating liquors. It was made broad enough to include goods or commodities which might be subjected to tax after its enactment, and any time that Congress saw fit to impose excise taxes on any articles, then any vehicle used for the removal, deposit and concealment of an article subject to a tax with intent to defraud the Government of the tax thereon became subject to forfeiture.

Congress, in enacting the Prohibition Act, might

have included a specific provision forfeiting a vehicle used to remove, deposit or conceal intoxicating liquor with intent to defraud the Government of the tax thereon, and if Congress had so provided, then, of course, there would be no room for contending that Section 3450 is still in force and effect.

Another way by which Congress could have rendered Section 3450 inapplicable to intoxicating liquors would be by repealing all measures providing for the taxation thereof.

It is not the contention of counsel for the plaintiff in error before the Circuit Court of Appeals that Section 3450 has been repealed in its true sense, but merely that certain intoxicating liquors which were subject to a tax before the enactment of the Prohibition Act no longer are subject to such tax, and therefore there can be no removal, deposit or concealment of such liquors with an intent to defraud the Government of any tax thereon.

The question as certified to this Court by the Circuit Court of Appeals is broad enough to cover all intoxicating liquors. Unquestionably there is today in bond in the United States much intoxicating liquor subject to taxation when lawfully withdrawn, and if an automobile were being used for the unlawful removal of such intoxicating liquor from such bonded warehouse with the intent to defraud the Government of the tax thereon, we can see no reason why Section 3450 of the Revised Statutes would not apply, and why such vehicle could not be forfeited thereunder.

There are many arguments which logically lead to this conclusion.

1. Section 3450 is a section enacted in aid of the Government's taxation powers, and the presumption against implied repeals always prevails in regard to such statutes.

Fabbri v. Murphy, 95 U. S. 196.

2. Section 3450 of the Revised Statutes deals with the subject of the collection of revenues, and provides a penalty for the violation of the internal revenue laws, while the National Prohibition Act applies to the specific subject of the manufacture of and traffic in intoxicating liquors, and statutes relating to one subject will seldom be construed to repeal by implication a prior statute relating entirely to another subject.

U. S. v. Gillis, 95 U. S. 416;

The J. D. Peters, 78 Fed. 373.

3. The Willis-Campbell Act, 42 Stat. 222, shows that Congress did not intend to repeal Section 3450, and by the terms of the Willis-Campbell Act, Section 3450 was re-enacted, if it ever was repealed by Section 26, Title II, of the National Prohibition Act.

The following cases either directly or impliedly hold that Section 3450 R. S. is repealed by the National Prohibition Act.

Commercial Credit Co. v. U. S., 5 Fed. (2d) 1;

U. S. v. One Ford Coupe, 4 Fed. (2d) 528;

U. S. v. One Buick Automobile, 1 Fed. (2d) 997;

One Big Six Studebaker Automobile v. U. S., 289 Fed. 256;
McDowell v. U. S., 286 Fed. 522;
One Ford Touring Car v. U. S., 284 Fed. 823;
U. S. v. One Haynes Automobile, 274 Fed. 926;
Ketchum v. U. S., 270 Fed. 416;
U. S. v. Widham, 264 Fed. 376;
U. S. v. American Brewing Co., 296 Fed. 772;
Bruno v. U. S., 289 Fed. 649;
Lewis v. U. S., 280 Fed. 5;
U. S. v. One Paige Automobile, 277 Fed. 524;
U. S. v. One Haynes Automobile, 268 Fed. 1003;
U. S. v. One Buick Motor Truck, 284 Fed. 395;
Reed v. Thurman, 269 Fed. 252;
U. S. v. Yuginni, 266 Fed. 746;
U. S. v. Spencer, 292 Fed. 871;
U. S. v. One Bay Horse, 128 Fed. 207;
U. S. v. Magnano, 299 Fed. 492.

The case which probably analyzes the effect of the National Prohibition Act and the Supplemental Act (Willis-Campbell Act) upon Section 3450 R. S. in the most complete manner is the case of the *Commercial Credit Company v. United States* (*supra*) from the United States Circuit Court of Appeals for the Sixth Circuit. The Court there shows that under Section 26 of the National Prohibition Act the interest in any vehicle of a person guilty of transporting liquor therein may be forfeited, while the interest of an innocent conditional vendor is protected, and that under Sec-

tion 3450 the entire property in the vehicle may be forfeited if the automobile is being used in transporting liquor in such a manner as to bring it within the provisions of said section, and the Court there says:

> "The acts cannot be differentiated by imputing in one case an intent to defraud the revenue, and considering this element absent in the other case."

We cannot follow the argument of the Circuit Court of Appeals in that case. True, every vehicle used to remove liquor within the meaning of Section 3450, upon which a tax has not been paid, must necessarily be guilty of transporting intoxicating liquors, and could, therefore, if the person in possession of the vehicle were convicted of unlawful transportation, be forfeited in so far as his interest is concerned, but notwithstanding this, it seems to us that it is within the power of Congress to provide that a person transporting liquor in a vehicle in a particular manner or with a particular intent is guilty of a different crime from the person merely transporting liquor for purposes of personal use or for sale. It could as well be argued that a statute enacted making it a misdemeanor to break and enter any dwelling would impliedly repeal a prior statute making it a felony to break and enter a dwelling in a particular manner or with a particular intent.

> "Where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include matter provided for in the special—the fact that the one is

special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

Rodgers v. U. S., 22 U. S. Supt. Ct. 583.

"The addition in the act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fradulent bonds for that purpose, or for illegally removing the spirits, does not deprive the 48th section of the act of 1864, of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand, and an information may be founded on both or either, whenever the facts will admit. It is a very common thing for cumulative remedies to be thus provided. The act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for. Statutes in *pari materia*, like the acts of 1864 and 1866 are to be

construed together, and repeals by implication are not favored if the acts can reasonably stand together."

Harrington v. U. S., 78 U. S. 356, 20 L. Ed. 167.

Our conclusion, therefore, in so far as the first question certified by the Circuit Court of Appeals is concerned, is that a vehicle used for the removal, deposit or concealment of intoxicating liquors subject to tax, and upon which a tax has not been paid, with intent to defraud the Government thereof, may still be forfeited under Section 3450 of the Revised Statutes, but, as we shall hereafter point out, the words "transportation" and "removal" as used in the two acts are not synonymous, and illicitly manufactured liquor or moonshine liquor is not subject to any tax since the enactment of the National Prohibition Act, but that the purported tax thereon is a penalty.

With those qualifications, the first question certified should probably be answered "Yes."

II

DO THE PROVISIONS OF SECTION 3450 OF THE REVISED STATUTES OF THE UNITED STATES AUTHORIZE THE FORFEITURE OF THE INTEREST OF A CONDITIONAL VENDOR RESERVING TITLE TO A CONVEYANCE WHO IS FREE FROM KNOWLEDGE, BLAME OR NEGLIGENCE IN THE PREMISES WHERE THE GOODS OR COMMODITIES CONCERNED CONSIST OF INTOXICATING LIQUORS ILLICITLY MANUFACTURED OR IMPORTED, A CASE UNDER THE SECTION REFERRED TO BEING MADE OUT IN OTHER RESPECTS?

We believe the law to be well settled at this time that a conditional vendor who is free from knowledge, blame or negligence is in no better position to escape a forfeiture under Section 3450 of the Revised Statutes than is the wrongdoer himself.

Goldsmith-Grant Co. v. U. S., 254 U. S. 505;
U. S. v. Mincey, 254 Fed. 287;
Logan v. U. S., 260 Fed. 746;
Dobbins Distillery v. U. S., 96 U. S. 385;
U. S. v. Two Barrels of Whiskey, 96 Fed. 479;
U. S. v. Stowell, 133 U. S. 1.

Since this Court has recently reviewed this matter and has refused to recede from the position as stated above, counsel deem it useless to invoke a re-examination of this subject. Therefore, assuming that there is a tax on intoxicating liquors illicitly manufactured or imported, which we do not admit, and which matter we will argue in response to another question, the second question certified should prob-

ably be answered "Yes". However, if the question is an attempt on the part of the Circuit Court of Appeals to secure an expression of this Court on the question of whether or not there is a tax on illicitly manufactured liquor, then the question should be answered "No".

III

DOES SECTION 3450 OF THE REVISED STATUTES AUTHORIZE THE FORFEITURE OF TAXABLE GOODS OR COMMODITIES AND THE CARRIAGE OR OTHER CONVEYANCE USED IN THE REMOVAL OR FOR THE DEPOSIT OR CONCEALMENT THEREOF WHERE THE ONLY REMOVAL, DEPOSIT OR CONCEALMENT WITH INTENT TO DEFRAUD THE UNITED STATES OF SUCH TAX THAT CAN BE SHOWN IS THE MERE MOVEMENT OF SUCH GOODS ON A TRIP OTHER THAN FROM THE ORIGINAL POINT OF IMPORTATION, MANUFACTURING OR BONDED WAREHOUSING?

IV

IN THE STATE OF WASHINGTON, WHERE THERE IS NO PLACE WHERE INTOXICATING LIQUOR CAN BE LEGALLY KEPT WITHOUT THE TAX THEREON BEING PAID OR OTHERWISE, CAN AN AUTOMOBILE BE SAID TO HAVE BEEN GUILTY OF BEING USED FOR THE REMOVAL, DEPOSIT OR CONCEALMENT OF INTOXICATING LIQUOR WITH INTENT TO DEFRAUD THE

GOVERNMENT OF THE TAX IMPOSED THEREON WHERE IT IS MERELY SHOWN THAT THE LIQUOR IS FOUND IN THE AUTOMOBILE AND THAT NO TAX THEREON HAS BEEN PAID?

Questions three and four are so interwoven that we deem it advisable to discuss them together, as the principles involved therein are very similar.

The laws of 1868 providing regulations for the manufacture and taxation of intoxicating liquors, which laws with minor changes were in force and effect at the time of the enactment of the National Prohibition Act, provide for the taxation of all distilled spirits, 3251 R. S.; that distilled spirits should not be removed from the distillery except to a warehouse which was under the control of the Commissioner of Internal Revenue, 3271 R. S.; that the distillery should give a bond conditioned for the payment of all taxes upon distilled spirits, 3280 R. S.; penalties were provided for avoiding the tax, 3256 R. S.; a method was provided for collecting the tax on distilled spirits unlawfully removed from the warehouse, 3253 R. S. and 3296 R. S.

The entire purpose of those statutes was to provide revenue and to prevent frauds upon the Government in connection with the manufacture or sale of liquor without the revenue thereon having been paid. It was in aid of these provisions that Section 3450 R. S. was enacted, and the words "removal",, "deposit" and "concealment" contained in that section must be construed in the light of their meaning at the time

when the section was enacted. In considering this section the Court should place itself as far as possible in the place of the legislative body which passed the statute at the time of its enactment, and should consider the vice which the statute was designed to prevent or remedy.

The Delaware, 161 U. S. 474;
Stewart v. Kahn, 11 Wall. 505;
Denn v. Reid, 10 Pet. 527;
Smith v. Townsend, 148 U. S. 494;
Heydenfeldt v. Daney Gold Mining Co., 93 U. S. 638.

A consideration of the law as it existed at the time of the enactment of Section 3450 can lead to no other conclusion than that the word "removal" therein meant the removal of taxable commodities from the place of their production, manufacture or lawful storage.

> "The term 'transport', as used in the National Prohibition Law, is broader, more comprehensive, more inclusive, than the term 'removed', as the latter word is employed in Section 3450. Intoxicating liquor is 'transported', within the meaning of the National Prohibition Law, when it is carried or taken from one place to another; but intoxicating liquor is 'removed', within the meaning of Section 3450, when it is carried or taken from a place of the kind that was in the mind of the lawmakers at the time of the enactment. It is as well recognized in statutory con-

struction and interpretation as it is in etymology that very many words depend more or less upon their context or the circumstances of their use for a part of the sense or meaning which they are intended to convey. In *U. S. v. Magnano*, 299 Fed. 492, decided May 6, 1924, the Circuit Court of Appeals held that the use of the word 'removed' in Section 3450 had reference to the transfer from particular specified places designated in the law, and my esteemed colleague, Judge Bledsoe, in an opinion filed in this court on July 22, 1924, in *U. S. v. One Buick Automobile Engine No. 988-235, Etc.*, 300 F. 584, has ably discussed and analyzed the difference between the meaning of the word 'transport' as used in the National Prohibition Law and the word 'removed' as found in Section 3450 of the Revised Statutes". 1 Fed. (2d) 1000-1001.

U. S. v. One Buick Sedan Automobile, 1 Fed. (2d) 997.

One of the best discussions of the meaning of "remove, deposit or conceal," which we have been able to find is the opinion of Judge Cushman in the case of the *U. S. v. One Ford Automobile Truck*, 286 Fed. 204. His conclusion is:

"The foregoing statutes show that the word 'removed', as used in section 14, has reference to removal from particular, specified places designated by law. These statutes clearly show the character of places meant, and the fact that they

were not again enumerated in section 14 of the Act of July 13, 1866, probably arises out of the fact that it was a general section, meant to cover illegal removals from all the places mentioned in the several sections of the act."

Section 3279 R. S. expressly covers the conveyance of liquor from an illicit or unauthorized distillery or warehouse, and provides:

> "And every person who knowingly receives at, carries or conveys any distilled spirits to or from, any such distillery, rectifying establishment, warehouse, or store, or who knowingly carries and delivers any grain, molasses or other raw material to any distillery on which such sign is not placed and kept, shall forfeit all horses, carts, drays, wagons or other vehicle or animal used in carrying or conveying such property aforesaid, and shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than six months."

It is significant that said Section 3279 uses the words "carrying or conveying" the property, while Section 3450 provides for the "removal, deposit or concealment" with intention to defraud the Government of the taxes imposed thereon. It is apparent that the word "transportation" as used in the National Prohibition Act, is synonymous with "carrying or conveying" in Section 3279, but that it is not synonymous with the word "removal", as used in

Section 3450. To the same effect are the following cases:

Commercial Credit Co. v. U. S. (C. C. A. 6), 5 Fed. (2d) 1;

U. S. v. One Buick Automobile, 300 Fed. 584;

U. S. v. One Studebaker Automobile, 298 Fed. 191;

U. S. v. One Kissell Car, 289 Fed. 120;

U. S. v. One Buick Sedan, 1 Fed. (2d) 997;

U. S. v. One Bay State Roadster, 2 Fed. (2d) 616;

Hester v. U. S., 284 Fed. 487;

Dukes v. U. S., 275 Fed. 142;

U. S. v. Magnano (C. C. A. 8), 299 Fed. 492;

U. S. v. One 1920 Premier Automobile (C. C. A. 9), 297 Fed. 1007;

U. S. v. One Ford Auto Truck, 286 Fed. 204;

U. S. v. One Kissell Touring Car (C. C. A. 9), 296 Fed. 688;

Lipke v. Lederer, 259 U. S. 557, 66 Law Ed. 1061.

As we have pointed out, Section 3450 was enacted in aid of the revenue statutes. A specific intent to defraud the Government of the tax on the liquor is an element of the offense which will render the vehicle removing, depositing or concealing the liquor subject to forfeiture. It has been held with almost complete unanimity that the burden of proving the necessary intent rests upon the Government.

> "If the seizure is made under Section 3450, the burden of proof is upon the Government, and it

must be prepared to show that the liquor is being transported with intent to defraud the United States of a tax, and it is important that this burden be sufficiently discharged upon trial on the issues raised by the denial of the allegations of the libel. See *Hester v. United States* (C. C. A.), 284 Fed. 487; *Dukes v. United States* (C. C. A.), 275 Fed. 142; *United States v. One Studebaker Automobile* (D. C.), 298 Fed. 191.

"In connection with the general subject matter, see *United States v. 385 Barrels, Etc., of Wine* (D. C.), 300 Fed. 565, and *United States v. One Buick Automobile* (D. C)., 300 Fed. 584. In the latter case it was held that:

> 'The provisions of Rev. St. Sec. 3450 (Comp. St. Sec. 6352), for forfeiture of conveyances used in the removal or for the concealment of articles with intent to defraud the United States of a tax due thereon, are applicable only where a taxable article is removed from one place to another, or concealed, for the purpose of evading payment of the tax, and cannot be applied to the mere transportation of illicit liquor in violation of the Prohibition Act, unless the circumstances warrant a fair and reasonable inference that there was also an intent to defraud the United States of the tax payable on such liquor by the manufacturer thereof.'

"On page 588, Judge Bledsoe said:

> 'I am persuaded, therefore, from a careful consideration of the section, induced no less by a study of its terms than from a consideration of the context and of the apparent intention of Congress in enacting it, that it was not intended, and may not be made, to apply to a mere transportation of liquor, made unlawful by the prohibitive provisions of the National Prohibition Law, unless there be also present in the circumstances connected with the transaction that which could justify the court in indulging in the fair and reasonable inference that there was "an intent to defraud the United States" of the tax payable upon such liquor'."
>
> *U. S. v. One Bay State Roadster* (*supra*).

Any presumption of intent to defraud the Government of a tax on liquor from the mere fact of possession, which might have been present prior to the enactment of the National Prohibition Act, has been wiped out by that Act. When tax-paid liquor could be obtained lawfully, it might have been argued that the possession of non-tax paid liquor *prima facie* showed an intent to deprive the Government of the tax thereon, but now, when the manufacture, sale or possession of intoxicating liquor capable of being used as a beverage is prohibited, and the only liquor that can be obtained for beverage purposes is illicitly obtained, that presumption can no longer prevail.

As has been well said, the difficulties now pre-

sented to the courts by the attempted use of Section 3450 are occasioned by the over-zealous attempts of the prohibition enforcement officers to use the statutes enacted for the purpose of raising revenue, to penalize a person who is violating a statute of the United States enacted some sixty years later with an entirely different purpose in view.

Congress has seen fit to provide that the interest of an innocent conditional vendor of a vehicle shall not be forfeited where it is used for the purpose of violating the National Prohibition Act. The Government's agents in using Section 3450 as they have been using it for the past year, are simply attempting to usurp the functions of Congress and determine for themselves that the penalties prescribed by Congress are not severe enough.

We submit that it never has been sufficient to convict a vehicle under Section 3450 merely to show that goods have been transported or placed in such vehicle and moved on a trip other than from the original point of importation, manufacturing or bonded warehousing.

We further submit that it has always been necessary for the Government to show a specific intent to defraud the Government of the tax imposed thereon, and that the mere finding of liquor in an automobile upon which no tax has been paid is not sufficient to show that intent.

Questions three and four as certified should be answered by this Court in the negative.

V

DID THE PROSECUTION OF THE DRIVER OF THE CAR UNDER THE NATIONAL PROHIBITION ACT CONSTITUTE AN ELECTION BY THE GOVERNMENT TO PROCEED UNDER SECTION 26 OF THAT ACT AND THEREBY PREVENT THE FORFEITURE OF THE CAR UNDER SECTION 3450 OF THE REVISED STATUTES OF THE UNITED STATES?

The driver of the car was prosecuted for transportation of liquor and pleaded guilty. The act for which he was prosecuted was the same act for which the car was seized and a prosecution under the National Prohibition Act bars the enforcement of any penalties under the Revenue Act. By Section 26 of the National Prohibition Act, it became the duty of the arresting officers to take possession of the car in which the liquor was transported or possessed and, upon such seizure by such arresting officers, it was incumbent upon the court to issue a show cause order why the car should not be forfeited.

U. S. v. One Ford Coupe (C. C. A. 5), 4 Fed. (2d) 528.

By Section 5, Chapter 134, of the Act of November 23, 1921, it is expressly provided that a conviction under the National Prohibition Act bars a prosecution under the Revenue Act. The driver of the car having been convicted under the National Prohibition Act, the car itself was, by Section 26 of the National Prohibition Act, likewise convicted and subject to

forfeiture, unless good cause to the contrary should be shown.

U. S. v. Forbes, 291 Fed. 138;
U. S. v. One Ford Automobile, 263 Fed. 241;
Coffey v. U. S., 116 U. S. 436.

Question five as certified should be answered in the affirmative.

VI

Is There Any Tax on Intoxicating Liquor Illicitly Manufactured As the Word Tax Is Meant and Used in Section 3450 of the Revised Statutes of the United States or are the So-Called Taxes Now Claimed to Be Collectable Merely Penalties?

Section 35, Title II, of the National Prohibition Act, among other things, provides:

> "No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale, a tax shall be assessed against and collected from the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of five hundred dollars on retail dealers, and one thousand dollars on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor or relieve anyone from criminal liability nor shall this act relieve any

person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

It has been held that under the above quoted section there is no tax upon illicitly manufactured intoxicating liquor, but that there is a penalty provided for engaging in such manufacture.

"When we inquire about a tax the first thought is—'What tax?' In some of the cases it has been said that the tax authorized by Sec. 35 of the National Prohibition Act, answered this question; but, passing the difficulty of finding an intent to defraud the Government of a tax which does not exist, and the doubt whether this section has any reference to a per-gallon tax, it has been authoritatively held (*Lipke v. Lederer*, 259 U. S. 557, 561), that the assessment which may be made under this section is not of a tax, but of a penalty for law violation. So it must be quite clear that the requirement of Sec. 3450 that there shall be an intent to defraud 'of a tax' cannot be satisfied by finding no tax only a penalty. R. S. Sec. 3296 is in the same situation. It does not provide a precedent tax out of which one may intend to defraud the Government; it provides a penalty to be assessed as punishment for wrongdoing.

"Apparently, previous statutes, like R. S. Sec. 3251, were superseded by Sec. 48 of the Act of August 27, 1894 (whether the lien and personal

liability clauses of 3251 would survive is here immaterial). The Act of 1894 adops and makes applicable the existing provisions of law for the payment of taxes by the use of stamps. This Act levied a tax of $1.10 on each proof gallon; we do not find that it contemplated or permitted any means of collection, or payment, save through the system of selling of tax-paid stamps by the collector. It provided for payment by the distillee before removal. This statute in turn was partially superseded by Sec. 600 (a) of the Revenue Act of 1918 (40 Stats., 1105). This provides that in lieu of all other Internal Revenue Taxes:

> 'There shall be levied and collected on all distilled spirit * * * that may be hereafter produced in * * * the United States * * * a tax of $2.20 (or, if withdrawn, for beverage purposes or intended for use as a beverage, a tax of $6.40) on each proof gallon * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of the existing law.'

"When this Act was passed the manufacture of whiskey for beverage purposes or its withdrawal from bond for such purposes was lawful, except as temporarily suspended by the War Prohibition Act. The evident theory was that at the time the distilled spirits were withdrawn from the distillery or bonded warehouse, they should be

classified as for beverage, or for industrial, medicinal, etc., purposes, and the tax paid accordingly. It was at least difficult to apply this statute intelligently to 'moonshine' whiskey, which never reached the contemplated point of withdrawal or classification; but then we come to Sec. 600 of the Revenue Act of 1921 (40 Stats., 285). This amended the last quoted statute by adding thereto: 'Provided, that on all distilled spirits on which a tax is paid at the non-beverage rate of $2.20 per proof gallon and which are averted to beverage purposes or for use in manufacture or production of any article, used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, * * * to be paid by the person responsible for such diversion.'

"Since the National Prohibition Act then forbade any diversion to beverage purposes or for use in an article intended for a beverage, here we have perhaps for the first time, the clear imposition by Congress of a per-gallon tax on the liquor involved in any forbidden transaction; but here, again, it seems most difficult to make application of the provision to 'moonshine' liquor. Indeed the amendment of 1921 cannot refer to such liquor, since its effect is confined to spirits on which the non-beverage tax has been paid, and its apparent scope was limited to spirits which had been withdrawn for industrial or other law-

ful purposes and then were diverted; but even if it were otherwise applicable, we do not find in this record any charge that the persons who transported were the 'persons responsible' for the diversion. In any effort to invoke this amendment of 1921, we must observe that this illicit liquor is diverted to beverage purposes the moment it is made as much as it ever is until its use as a beverage is finally accomplished; and it would hardly be thought that the ultimate consumer is the person intended to be taxed by the amendment of 1921, or that his act is 'deposit or concealment' under R. S. Sec. 3450.

"Were it assumed that the distiller of 'moonshine' wished to pay the per-gallon tax thereon—whatever the amount might be, $2.20 or $6.40—he would have difficulty enough in doing so, though possibly the implication of R. S. Sec. 3253 would point the way; but if the later purchaser of the same liquor wished to make this payment, would he be able to discover any way in which it could be done? If he could have done it under the old revenue laws, it would have been by the purchase of stamps and affixing them to the package—though he was not entitled to buy stamps and practically he could not have done this; but the National Prohibition Act, Sec. 35, after providing that the Act shall not relieve any one from paying any taxes imposed upon the manufacture of such liquor or the traffic in it—

a provision obviously intended to retain some liability on the part of the manufacturer and trafficker but reaching no one else—proceeds, 'no liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance * * *.' So far as we find there was in the old revenue laws no way of paying any per-gallon tax except to pay it by revenue stamps 'in advance' of the act which would make the liquor available for use; but now comes Sec. 35 and prohibits the use of any revenue stamps or tax receipts in advance.

"Unless we have in some respect misapprehended the system, we cannot find that the mere transporter of 'moonshine' is under duty to pay a per-gallon tax, which duty would make it the necessary basis for his intent to defraud; and we must regard the provision of Sec. 35, abolishing and forbidding all advance payments through stamps and receipts, to be in 'direct conflict' with the old system of per-gallon taxation, and hence to repeal it *pro tanto*."

Commercial Credit Company v. United States, 5 Fed. (2d) 1.

See also:

Ketchum v. U. S., 270 Fed. 416;

Lewis v. U. S., 280 Fed. 5;

One Ford Touring Car v. U. S., 284 Fed. 823;

Lipke v. Lederer, 259 U. S. 557; 66 L. Ed. 1061;

Harkins v. Willard, 146 Fed. 703;
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Fontenot v. Accardo, 278 Fed. 871;
U. S. v. 2515 Barrels of Beer, 1 Fed. (2d) 500;
U. S. v. One Haynes Automobile, 274 Fed. 926.

There being no tax on intoxicating liquor illicitly manufactured within the meaning of Section 3450, the sixth question as certified should be answered "No".

All of which is respectfully submitted.

LOREN GRINSTEAD,
WILLIAM T. LAUBE,
JAMES A. LAUGHLIN, and
THOMAS E. DAVIS,
Attorneys for Port Gardner Investment Company.
1408 Dexter Horton Building, Seattle, Washington.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 611

PORT GARDNER INVESTMENT COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit. The decision of the District Court has not been reported.

JURISDICTION

Jurisdiction is conferred by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The facts in the case are set out in the certificate, pp. 1–2. They are, in substance, that in August, 1924, within the judicial district for the

Western District of Washington, prohibition agents seized a Jewett sedan automobile while the same was being used by one Neadeau in the transportation of a five-gallon keg of illicit liquor, commonly known as "moonshine" whisky, on which the tax had not been paid. Neadeau was charged with possession and transportation of intoxicating liquor in violation of the National Prohibition Act, pleaded guilty to both charges in the District Court for the above district, and was sentenced to pay a fine. The Government then sought to forfeit the automobile under Section 3450, Revised Statutes, on the ground that the same was being used by Neadeau in the removal and for the deposit and concealment of distilled spirits, to wit, "moonshine" whisky, with the intent to defraud the United States of the tax thereon. The Port Gardner Investment Company, assignee of the vendor of said automobile under a conditional sales contract, claimed title to the car and intervened in the suit to protect its interest therein. The District Court ordered a decree of forfeiture in favor of the United States. The intervenor appealed to the Circuit Court of Appeals for the Ninth Circuit, which certified to this Court the following questions:

QUESTIONS CERTIFIED

1. Is Section 3450 of the Revised Statutes of the United States in force and effect in so far as it provides for the forfeiture of automobiles or other

vehicles where the same are used or are being used for the transportation of intoxicating liquor?

2. Do the provisions of Section 3450 of the Revised Statutes of the United States authorize the forfeiture of the interest of a conditional vendor reserving title to a conveyance who is free from knowledge, blame, or negligence in the premises where the goods or commodities concerned consist of intoxicating liquors illicitly manufactured or imported, a case under the Section referred to being made out in other respects?

3. Does Section 3450 of the Revised Statutes authorize the forfeiture of taxable goods or commodities and the carriage or other conveyance used in the removal or for the deposit or concealment thereof where the only removal, deposit, or concealment with intent to defraud the United States of such tax that can be shown is the mere movement of such goods on a trip other than from the original point of importation, manufacturing, or bonded warehousing?

4. In the State of Washington, where there is no place where intoxicating liquor can be legally kept without the tax thereon being paid or otherwise, can an automobile be said to have been guilty of being used for the removal, deposit, or concealment of intoxicating liquor with intent to defraud the Government of the tax imposed thereon, where it is merely shown that the liquor is found in the automobile and that no tax thereon has been paid?

5. Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of that Act, and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?

6. Is there any tax on intoxicating liquor illicitly manufactured, as the word "tax" is meant and used in Section 3450 of the Revised Statutes of the United States, or are the so-called taxes now claimed to be collectible merely penalties?

This case is assigned with the *Ford Coupe case*, No. 473. Both are to be argued as one. The principal questions, to wit, whether since the National Prohibition Act there is a tax on "moonshine" whisky, and whether Section 3450, Revised Statutes, is repealed or superseded by Section 26, Title II, of the National Prohibition Act, have already been considered in the Government's brief on file in the *Ford Coupe case*. For the sake, therefore, of clarity and to avoid unnecessary repetition by general treatment of the subject again, the arguments in this brief will follow strictly the questions propounded to this Court by the Circuit Court of Appeals for the Ninth Circuit and will be confined to a reply to those questions.

ARGUMENT

I

The answer to the sixth question asked by the Circuit Court of Appeals underlies all the other

inquiries, and upon an affirmative reply to it depends further consideration of the subject. For that reason it will be taken up first.

Question Six

Is there any tax on intoxicating liquor illicitly manufactured as the word "tax" is meant and used in section 3450 of the Revised Statutes of the United States, or are the so-called taxes now claimed to be collectible merely penalties?

The Government submits that there is certainly a tax on liquor illicitly manufactured. There still is the very kind of a tax that was contemplated when Section 3450 was passed. Undoubtedly, some of the so-called taxes *are* penalties, as this Court has pointed out in the *Lipke* decision (259 U. S. 557), but we vigorously resist so naive a statement as is made by counsel for claimants in these cases that merely by the passage of the National Prohibition Act all taxes changed their nature and became penalties if they referred to liquor! The "double taxes" and special occupational penalties listed in Section 35, Title II, of the National Prohibition Act are penalties. They clearly involve punishment for infraction of the law. If the only proof that could be offered in these cases was that defendants had tried to evade the "doubling" of the so-called taxes described by Section 35, we would at once concede that the disposition of the automobiles here involved would have to be in accordance with the provision of Section 26 of the National Prohibition Act. Condemnation of prop-

erty under Section 3450 rests on what can be proved in each case, and it must be at least a clear intent to evade taxes, which is something quite different than an attempt to frustrate the National Prohibition Act. Sometimes the two offenses will overlap, but they will not of necessity always do so. That intent to escape the payment of the basic tax on spirituous liquors was plainly shown by direct or strong circumstantial evidence in each of these cases. And let us emerge from the confusion of any further argument on the penalty nature of the so-called taxes named in the National Prohibition Act and come directly to the one plain inevitable *tax* that does become due and payable the moment a gallon of "moonshine" liquor drops from its illicit still. That is the tax assessed under Section 600 (a) of the Revenue Act of 1918 (Act. Feb. 24, 1919, Chap, 18, 40 Stat. 1057, 1105) of $2.20 on every gallon of distilled spirits "now in bond or that have been or that may be hereafter produced" in the United States. That tax attaches upon the production of the liquor. It is variously referred to as a production tax, a manufacturer's tax, etc., but it is a sum certain, becoming a lien on all liquors from the moment of their production, and however many more taxes or penalties may be added, it varies not, whatever may be the ultimate use to which the liquors are put. The amount in the present law of $2.20 per gallon, which was effective when these cases arose, is larger, but the tax is the same in conception and theory as

when the parent statute was first passed in 1862. It was then and still is a tax for which, as Judge Sibley, speaking from a district where statutes applicable to "moonshine" liquor have always been under frequent consideration, said in *United States* v. *One Marmon Automobile* (5 F. (2d) 113, 115—

> the liquors are seizable for nonpayment anywhere and in anyone's hands.

Beginning in 1862, with the first liquor-taxing statutes (later Section 3251, Revised Statutes), following through the several amendments thereto, such as the Act of March 3, 1875 (Chap. 127, 18 Stat. 339), the Tariff Act of 1894 (Act Aug. 27, 1894, Chap. 349, 28 Stat. 509), and the Revenue Act of 1917 (Act Oct. 3, 1917, Chap. 63, 40 Stat. 300), down to Section 600(a) of the Revenue Act of 1918, *supra*, and its amendment of 1921 (Act Nov. 23, 1921, Chap. 136, 42 Stat. 227), we trace uninterruptedly the imposition of a production or basic tax which has been as much assessed against the illicit distiller as the legitimate manufacturer of intoxicating liquors. In fact, the whole network of internal-revenue statutes relating to spirituous liquors, with their drastic penalties for nonconformity to seemingly trivial regulations (such as marking the location of a still, registering it as soon as set up, exhibiting receipts in conspicuous places, and many other similar requirements), has grown up from the experience of the Government in trying to collect this basic liquor tax. From such efforts also came the

Whiskey Rebellion; and where would be the novels of popular appeal and much of the romance and legend without the stalking by Government tax collectors or " revenuers " of the hardy " moonshining " mountaineer! Yet these statutes have, without variation, provided for the payment of the tax " by the distiller of spirits on or before their removal from the distillery." Consequently, it is an argument without merit to urge that illicit liquor is not meant to be taxed because the statute names the distiller as the person to pay it and a " moonshiner " does not fall into the definition of such distiller, in view of the fact that for half a century the Government has been assessing and collecting these taxes from " moonshiners " as well as from legitimate dealers.

Equally fallacious are the two other reasons advanced by claimants in these cases to support their theory that the $2.20 basic tax in Section 600 (a) refers solely to liquor legitimately produced. The first, that illicit liquor can not be *withdrawn* from bond and consequently can not ever be in that physical situation described by the statute as the time when the tax must be paid, is torturing the intent of the law into an excuse to exempt the very class of persons the legislature *least contemplated releasing.* That provision in the Act postponing the payment of the manufacturer's tax until removal of the spirits from a bonded warehouse was inserted for the *benefit* of the *legitimate* distiller, allowing him to give bond for the taxes instead of

paying them as soon as the liquor was produced. (*United States* v. *Witten,* 143 U. S. 76, 78.) A beneficent provision of the law to protect legitimate business can not be so warped into an excuse to exempt illegitimate business and thus unfairly distribute the burdens of taxation to the advantage of the outlaw trade.

The other theory on which claimants lean heavily for support of their contention that illicit liquor is not subject to tax, to wit, that the illicit producer is to be excused from taxation because he can not buy strip stamps in advance, is the reasoning advanced in several of claimants' authorities, but especially is it a stumbling-block in the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Commercial Credit Company* v. *United States* (5 Fed. (2) 1), which opinion claimants adopt as their major argument. In that case the court concludes that Section 600 (a) can not apply to illicitly manufactured liquor, because (p. 4)—

> It was, at least, difficult to apply this statute intelligently to "moonshine" whisky, which never reached the contemplated point of withdrawal or classification,

and after considering the 1921 amendment to Section 600 (a) the court further concluded that said amendment could not refer to illicit liquor, because (p. 5)—

> Here, again, it seems most difficult to make application of the provision to moonshine liquor.

It is respectfully submitted that the *difficulty* of the application of a law, designed to control and tax legitimate business, to illegitimate business has never been an excuse for exempting the illegitimate product. This Court has recognized that fact in the case of *Vigliotti* v. *Pennsylvania,* 258 U. S. 403, which sustained the conviction of the defendant for maintaining a saloon without first having obtained a license as required by the state license law, known as the Brooks Law, the contention of defendant being that it was impossible for him to obtain a license because of the provisions of the National Prohibition Act.

It is true, as the Circuit Court of Appeals in the *Commercial Credit Company case* said, that since the passage of the National Prohibition Act no strip stamps can be issued in advance. The practice of evidencing the payment of the tax by strip stamps was undoubtedly expressly designed to facilitate the apprehension of tax evaders. Although since prohibition the method of paying a tax upon the manufacture of liquor has changed, nevertheless any dealer of lawful intentions may by securing a permit under the National Prohibition Act have in appropriate cases strip stamps placed on his commodity, showing that the tax has been paid. But where he has, as in these cases, concealed and secreted unmarked " moonshine " liquor, bearing no permit tag and no strip stamps or other tax identification, he is just as guilty of an intent to evade the tax as he would have been

prior to the adoption of the Eighteenth Amendment.

In the cases cited by the claimants as authority against taxing the production of liquor because it has been prohibited, a wrong theory of just what the payment of a tax really means is discernable. The opinion in the *License Tax cases* (5 Wall. 462) has settled the fact that taxing does not mean giving a protection from the Government in return for the tax. On pages 472 and 473 this Court said:

> Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, can not be taxed by the National Government. * * *
>
> But, as we have already said, these licenses give no authority. They are mere receipts for taxes. * * *
>
> There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. *The two lines of legislation proceed in the same direction, and tend to the same result.* (Italics ours.)

The above statements were made when the police power over the liquor traffic, and consequently the issuance of licenses, was in the States and the Federal Government had only the power to tax. Now, both the regulation of the traffic and the power to tax it are combined in the National Government.

Therefore the Federal courts now have before them when considering the intent of Congress with respect to legislation which prohibits and legislation which taxes the identical problem that state courts had when they considered the effect upon state and local license laws of the passage of state prohibition statutes. As an almost perfect analogy there is suggested to this court the case of *Krnich* v. *McCleary* (134 N. E. 462), where the Supreme Court of Ohio said (p. 464):

> It therefore would seem that it has become the settled policy, not only of the State of Ohio, but of the other States of the Union and of the Federal Government as well, to at one and the same time impose a tax upon the business of trafficking in intoxicating liquors, whether that tax be denominated a privilege tax, a license, or an assessment, in territory where the trafficking is prohibited and in territory where the trafficking is permitted, and in Ohio substantially the same provision for the assessment of a tax has prevailed under two different and antagonistic provisions of the Constitution, to wit, under a provision prohibiting the licensing of the traffic in intoxicating liquors, and under a provision requiring the licensing of the traffic in intoxicating liquors, and the assessment has been levied and upheld by the courts in all the territory of the State regardless of the prohibition in certain subdivisions thereof, and now that the prohibition is by constitutional provision and extends throughout the State we see no reason

> for adopting a different policy, since the very provision of the Constitution which prohibits the sale and manufacture for sale of intoxicating liquors as a beverage expressly confers upon the General Assembly the power to enact laws to make such prohibition effective.

An equally pertinent observation is to be found in *Youngblood* v. *Sexton* (32 Mich. 406) where Judge Cooley, considering the right of the State of Michigan to tax an illegal business, said (pp. 421, 426):

> The idea that the State lends its countenance to any particular traffic by taxing it, seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens; they are necessary, it is true, to the existence of government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities, that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the Government when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the

> burden is withheld. It is safe to predict that if such were the legal doctrine any citizen would prefer to be visited with the untaxed frowns of Government rather than with those testimonials of approval which are represented by the demands of the tax-gatherer. * * *
>
> If one puts the Government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual. Certainly, whatever discriminations are made in taxation ought to be in the direction of making the heaviest burdens fall upon those things which are obnoxious to the public interests, wherever that is practicable.

All through the years when the passage of prohibition legislation designed to carry into effect the policy of the 18th Amendment was before Congress it has unmistakably indicated an intention to retain all taxes on intoxicating liquors, and indeed, if possible, to add to those burdens by piling up so-called "double taxes" and heavy penalties. See report of the Senate Judiciary Committee, No. 151, 66th Congress, First Session, on H. R. 6810 (Volstead Act), pp. 8, 9, 18, and 19.

Turning to the laws themselves, the intent of Congress can be clearly gathered if three provisions are read together. Section 3, Title II, of the National Prohibition Act—

> All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented—

should be read in connection with that portion of Section 35 which provides that—

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws—

and Section 5 of the Act Supplemental to the National Prohibition Act (42 Stat. 222), which provides in part:

> That all laws in regard to the * * * taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force * * * except such provisions of such laws as are directly in conflict. * * *

These provisions indicate a desire expressed in a crescendo of intensity on the part of Congress to use every possible means to regulate the liquor traffic and to put an end to it for beverage pur-

poses. It is a matter of common knowledge that to tax is to control, and, as said in the report of the Senate Judiciary Committee, above referred to, " one purpose of taxation sometimes is to discourage the business and perhaps put it out of existence." Congress must have been acting in line with that policy when it deliberately imposed the duties of enforcement on the Commissioner of Internal Revenue, the officer charged with the collection of liquor taxes. The most reasonable conclusion to draw from the fact that Congress combined the duties of prohibition enforcement with those of taxation is that it was further practically carrying out the intent above expressed to make use of the numerous taxing provisions of the internal revenue laws to help reach the goal of effective enforcement.

Furthermore, this Court has many times indicated that Congress may tax a prohibited traffic. (See especially *United States* v. *Yuginovich*, 256 U. S. 450, and *United States* v. *Stafoff*, 260 U. S. 477.) The fact that this Court has ruled that Congress *may* tax liquors has been commented upon in most of the District Courts and the Circuit Courts of Appeals having this subject under consideration. We submit, however, that the great confusion on the question as to whether Congress actually has taxed liquors while prohibiting their production arises from the fact that these courts must have overlooked the statement of this Court in the *Yuginovich case, supra*, p. 464:

> We agree with the court below that while Congress *manifested an intention to tax liquors illegally as well as those legally produced,* which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act. (Italics ours.)

It is apparent, therefore, that this Court in the *Yuginovich case* recognized the age-old distinction between taxes and penalties. It held that Congress intended that taxes should continue to be regularly imposed on illict liquor, the only qualification being that Congress did not intend to continue in force the old internal revenue system of penalties together with those provided for in the National Prohibition Act. This is made perfectly clear by reading the *Yuginovich* decision in the light of the later opinion in the *Stafoff case.* Considering them together we find this Court has decided that Congress intended to and in fact has taxed liquors illegally as well as those legally produced, but only after the passage of the Supplemental Act did it indicate an intention to preserve the penalties prescribed in the old internal revenue laws as well as those in the National Prohibition Act.

Discarding all contention over the nature of the penalties (called taxes) in Section 35 of the National Prohibition Act, and discarding further the undetermined question (which it is entirely unnecessary to consider in these cases) whether the

$4.20 additionally assessed under Section 600(a), if the liquor is diverted to beverage use, is a tax or a penalty, the fact still remains that the $2.20 per gallon levied as a production tax in Section 600(a) retains its tax character and is due and payable on every gallon of illicit as well as legitimate liquor the moment produced in the United States, and that in these cases the drivers of the cars in question concealed the liquors with the definite intent of evading *that tax*. Whatever further or other intent they may have had to violate other sections of the law or other prohibitions of State and Federal statutes is unimportant here.

II

Question One

Is section 3450 of the Revised Statutes of the United States in force and effect in so far as it provides for the forfeiture of automobiles or other vehicles when the same are used or are being used for the transportation of intoxicating liquor?

We maintain that Section 3450 of the Revised Statutes is just as applicable to-day as it was before the adoption of national prohibition. Section 3450 is a general statute applying to all articles which may be the subject of tax. In so far, therefore, as liquor is now taxable, and to just such extent as the Government in individual cases is able to prove an intent to evade that tax, Section 3450 may be invoked to condemn a vehicle which as an agency of transportation, concealment, or removal of taxable goods assists in carrying out the cheating intent.

That Section 3450 is more drastic than Section 26 of the National Prohibition Act is not of itself reason for considering that the latter statute is in such "direct conflict" as to nullify the former. The penalties for evasion of taxes and frauds on the revenue are uniformly high. We have many instances where a comparison of the Internal Revenue, Tariff, and Custom Laws with the National Prohibition Act shows the penalties of the latter to be much lower. These internal revenue statutes are old; penalties have increased with governmental experience. Prohibition is comparatively in its infancy.

The difference between the punishments in the schedule of penalties in the Internal Revenue Statutes and those in the prohibition statute was a reason for this Court to decide in the *Yuginovich case* that the intent of Congress, as expressed in Section 35 of the National Prohibition Act, was not such as to keep both systems in full force. However, after this Court had so ruled, Congress spoke again in clearer terms in the Supplemental Act, which this Court in the *Stafoff case* held to mean that Congress does *now* intend punishment under either statute to be possible, leaving it to the prosecutor to elect which law, the Internal Revenue with drastic penalties or the National Prohibition Act under which the same offense is sometimes only a misdemeanor, is to be used. Of course his choice would depend on the quality and kind of evidence in the individual case and the scope of the offense.

But Congress plainly wants prosecuting attorneys to follow either of the two paths in discharging their duty of enforcing the laws. This Court will not presume that the choice of statutes under which to proceed is made harshly or unjustly. It is not new for the same state of facts to constitute an offense against several statutes.

In *The Distilled Spirits,* 11 Wall. 356, 365, this Court said:

> The addition in the act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fraudulent bonds for that purpose, or for illegally removing the spirits, does not deprive the 48th section of the act of 1864 of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand, and an information may be founded on both or either, whenever the facts will admit. It is a very common thing for cumulative remedies to be thus provided. The act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for. Statutes *in pari materia,* like the acts of 1864 and 1866,

> are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together.

In enforcing National prohibition Congress has decided to withhold none of the old instruments of law which may be of service to the prosecutor. That is our claim here—there is no direct conflict between Section 3450 and Section 26 of the National Prohibition Act. Either is open. They overlap occasionally, but they mutually support the purpose of Congress. The prosecutor examines carefully his evidence to determine under which statute it enables him to proceed. Quite different proof is demanded. Under Section 26 he looks primarily to whether he has evidence enough to sustain criminal prosecution against the driver, after which disposition of the car follows as a matter of course. Under Section 3450 he must be able to show the untax-paid character of the liquors transported as well as acts or knowledge on the part of the driver that indicate an intent to conceal the liquors and dodge the tax. It is to be noted that the Government in weighing the evidence relies upon the basic production tax and not merely upon the pyramiding so-called double taxation that Section 35 attaches by reason of the diversion of the liquor to improper use.

A clear statement of the mutual support of the internal revenue and prohibition statutes is to be found in *United States* v. *Turner*, 266 Fed. 248. The question there was whether Section 3296,

Revised Statutes (which is the Internal Revenue companion statute to 3450, the latter applying to the forfeiture of the vehicle for removal or concealment of liquors and the former punishing the person who conceals them from tax), has been repealed by the National Prohibition Act, and on page 252 Judge McDowell said:

> By far the commonest difficulty encountered by the government in prosecutions for removals of liquor under section 3296 is that of proving beyond reasonable doubt that the liquor was untaxed. A recognition of this difficulty and an intent to aid and supplement the old statute by the transporting clause of the Volstead Act seems to me to comport with the chief purpose of the framers of the Volstead Act much better than does an intent to repeal the removal clause of section 3296. Both statutes are useful in preventing the use of intoxicating liquor as a beverage. Neither fully covers the ground; but the two together seem to reach every method of evading the fundamental intent of the Volstead Act, in so far as the movement of liquor is concerned, and the use of intoxicating liquor as a beverage to any considerable extent necessitates movement of liquor.

The purpose of Section 3450 and other statutes *in pari materia* was to provide revenue and to prevent frauds upon the Government in connection with the manufacture and sale of liquor. It was in aid of these statutes that Section 3450 was

passed, so the words " removal," " deposit," and " concealment " contained therein must be construed in the light of their meaning at the time the section was enacted, which would make them read " removal, deposit, and concealment from taxes."

Later the National Prohibition Act was passed for the purpose of reaching new situations; and although in Section 35 thereof it states that no one should be relieved from paying taxes, its primary purpose was to prevent the use of intoxicating liquor as a beverage. Consequently, the word " transporting," in Section 26, should be read in the light of its meaning when Congress had the Volstead Act before it. That would make the word " transporting," in the National Prohibition Act, quite different from the word " removal," in Section 3450, the latter meaning " removal to evade taxes," the former " transporting for beverage purposes." Reading the two sections in the light of the respective purposes for which they were passed, we have a separate measure of proof under each, and we are forced to conclude that Congress intended to keep Section 3450 in effect; or, if it failed to do so by the National Prohibition Act, to revive the same by Section 5 of the Supplemental Act, so that the Government might have the benefit of a statute whose aid to prohibition enforcement in many instances may so well be invoked and whose broad powers may so effectively be employed as additional remedies to those provided by the National Prohibition Act for car-

rying out the constitutional mandate. In this way a system is established whereby almost any conceivable character of illegal traffic in liquors for beverage or nonbeverage purposes might be reached by statutory provisions and the offender, whether it be the person or the *res*, be made subject to the punishments, penalties, or forfeitures prescribed. If this was the purpose of Congress, as the Government contends, then the words "removal," "deposit," and "concealment" in Section 3450 should not be given the narrow construction contended for by opposing counsel. This Court has held that revenue laws should be liberally construed to carry out the purposes of their enactment, *Smythe* v. *Fiske*, 23 Wall. 374,380; and Section 3, Title II, of the National Prohibition Act provides that all the provisions of that Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Section 3450 of the Revised Statutes is an integral part of the system of collection of penalties for the evasion of taxes and customs duties. To tear it out of its setting and leave only Section 26 of the National Prohibition Act, which would apply to the same cases in some instances but in many instances would not, is to impute to Congress an intent to leave a hole in the system of regulation, taxation, and prohibition of intoxicating liquors where Congress would have been least likely to do so: a hole through which the "moonshiner" might escape, but the legitimate dealer

could not. To be bound to the use of Section 26 in every case of carrying "moonshine" out of the mountains defeats the very purpose of the National Prohibition Act. It permits the carriers of illicit liquor so to mortgage or transfer the titles of vehicles as to avoid forfeiture. It necessitates a conviction of a criminal charge before the forfeiture can be effected. This produces court delays, with resultant accumulation of expensive storage charges, while court action, with all the delays incident to criminal law, is being awaited. All this encumbers the dockets. It was found that Section 3450 afforded a much more summary method of dealing with offenders and effected prompt dispatch of cases brought thereunder with consequent relief of the dockets. Therefore the Government has been unwilling to concede, notwithstanding decisions to the contrary, that Section 3450 is no longer available for prohibition enforcement, but has encouraged the use thereof wherever the facts clearly fit it to the offense. As was said by the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *One Saxon*, 257 Fed. 251, 253:

> If one thus engaged in illicit transportation could protect his automobile from forfeiture on proof that the legal title was in some one else, or that some one else had a mortgage on it, the difficulty of enforcing the law would be greatly increased, and the penalty of forfeiture almost always evaded.

It may be conceded that when Congress enacted Section 3450 it did not have in mind that the section should be used in the enforcement of prohibition, but it is submitted that Congress did have this purpose in mind when it reenacted that section at a later date and that it then intended that said section should be a supplement to the National Prohibition Act. This was done at a time when Congress knew of all the overlapping provisions of the various laws and of the obstacles and difficulties lying along the road of prohibition enforcement. In *United States* v. *One Ford Coupe*, 3 F. (2d) 64, Judge Dawkins said, p. 66:

> I do not find any conflict between the Volstead Act and section 3450 in so far as procedure is concerned, but the one can be treated as supplemental to the other, or as affording an additional remedy to the government in such matters.

With the passage of the National Prohibition Act Section 3450 of the Revised Statutes was intended to be left as an effective agency for punishing instruments which at this age of rapid transportation can most effectively be used to evade tax laws and distribute " moonshine " liquors, and Section 26 was put into the National Prohibition Act to reach an entirely different kind of intent in the use of vehicles to violate law. Congress knew that Section 3450 applied only when the Government had direct or circumstantial evidence of tax evasion. When the National Prohibition Act was

passed, however, there were great quantities of liquors stored in all parts of the United States, which were fully tax-paid. They were in grocery stores, drug stores and warehouses. (See facts in *Street* v. *Lincoln Safe Deposit Company,* 254 U. S. 88.) The honest confusion of what might be done under the new law in the minds of those who desired to distribute these liquors to their private homes, where their consumption would not be unlawful, presented problems of probable law evasion which Section 3450 could not reach, and for which in many instances the procedure under Section 3450 would be unnecessarily harsh. Section 26 of the National Prohibition Act was made to fit just such circumstances and took care of all sorts of transporting of liquors when the tax evasion was not a material element, as we insist it is in concealing " moonshine " or other liquors on which the first $2.20 production tax is unpaid. The framers of the prohibition law knew that many of the prohibited acts of transportation of liquor on which the production tax of $2.20 had been fully paid could not be reached under Section 3450. We submit that it was these cases to which Section 26 of the National Prohibition Act was directed; that there is no direct conflict between the two statutes, but that their purposes dovetail and mutually support the constitutional policies on taxation and prohibition.

III

Question Two

Do the provisions of section 3450 of the Revised Statutes of the United States authorize the forfeiture of the interest of a conditional vendor reserving title to a conveyance who is free from knowledge, blame, or negligence in the premises, where the goods or commodities concerned consist of intoxicating liquors illictly manufactured or imported, a case under the section referred to being made out in other respects?

The reply to this question should be in the affirmative, because it has been shown that there is a tax due on illicit liquor of $2.20 per gallon; that Section 3450, Revised Statutes, is an unrepealed part of the Internal Revenue legislation to aid in the collection of that tax; and this court has already in the case of *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, decided that the innocence of the lienor of the property will not defeat the operation of the statute.

IV

Question Three

Does section 3450 of the Revised Statutes authorize the forfeiture of taxable goods or commodities and the carriage or other conveyance used in the removal or for the deposit or concealment thereof where the only removal, deposit, or concealment with intent to defraud the United States of such tax that can be shown is the mere movement of such goods on a trip other than from the original point of importation, manufacturing, or bonded warehousing?

The Government submits the answer to this inquiry should be in the affirmative, because the place

from which the transportation or concealment occurs is immaterial providing the intent to defraud is shown. The tax is payable the moment the liquor is produced and at every moment thereafter, and anyone who aids in its concealment from revenue officers who might seize it and levy the tax is a party to the fraud.

The facts in these cases show that the liquor was untaxpaid. The record does not disclose, however, that the driver actually knew the tax was not paid. The liquor was contained in a five-gallon keg. A cask or package containing five gallons or more is required to have upon it stamps, marks, or brands to denote the payment of the tax. See *Dukes* v. *United States,* 275 Fed. 142; *Hester* v. *United States,* 284 Fed. 487; Section 3289, R. S.; Section 3320, R. S., as amended by the Act of July 16, 1892, Chap. 196, 27 Stat. 183, 200, and the Act of August 27, 1894, Chap. 349, 28 Stat. 509, 567; Section 3323, R. S., as amended by the Act of July 16, 1892, *supra.* The driver knew, or is presumed to have known, that the liquor transported by him was taxable. The liquor, being "moonshine" whiskey, did not have the required stamps or marks showing payment of the tax. This was sufficient to put the driver on notice that the tax was unpaid. Having thus knowingly transported untaxpaid liquor, he is presumed to have transported it with intent to defraud the Government of the tax,

as he is presumed to have intended the natural consequences of his acts. Under these circumstances the automobile used in such transportation is clearly forfeitable under Section 3450. In *United States* v. *One Cadillac Automobile*, 292 Fed. 773, Judge Lindley said, p. 774:

> The only question now before the court is whether or not there is any evidence by which it can be said that this liquor was being removed for the purpose of defrauding the United States of the tax. As above noted, all distilled spirits are subject to tax except such as is withdrawn for export and such as is legally withdrawn for use by the Government or other special purposes. There is no testimony directly to the facts that the tax upon the spirits contained in the bottles in the case at bar had been paid or that it had not been paid. *If it had been paid, of course, the libel can not succeed.* If it has not been paid, the court will imply an intent upon the part of one who is illegally transporting liquor on which the tax was not paid to defraud the United States of the tax, as every man must intend to do that which is the natural result of his acts. So, if the owner here was illegally transporting distilled liquor upon which the tax had not been paid, he was thereby evading the tax and will be presumed to have intended thereby to defraud the United States of the tax. (Italics ours.)

In *United States* v. *One White Truck,* 4 F. (2d) 413, Judge Cushman said, p. 414:

> As the ordinary and natural result of the manner of carriage was to conceal from the officers of the internal revenue the nature of the article carried, and thereby hinder and prevent the collection of the tax due thereon, the presumption is warranted, in the absence of controverting evidence, that the deposit and concealment in the truck were with intent to defraud the United States of the tax which was due upon these distilled spirits, whether they were of domestic or foreign manufacture.

The reasoning of Judge Sibley in *United States* v. *One Marmon Automobile,* 5 F. (2d) 113, 114–116, is submitted as part of the reply to this question:

> All persons concerned knew a tax was due upon the production of the whisky, and that it had not been paid and was not intended to be paid by anyone. Their active intent, however, was more taken up with escaping the penalties of the Prohibition Law than with the matter of evading the taxes. It is not shown that the whisky was gotten directly from a distiller who owed the taxes, nor that Robinson and Hall had the evasion of the taxes especially in mind in concealing and removing it in the car, if they were the operators.
>
> Under these facts, is the car forfeited under R. S. Sec. 3450 (Comp. St. Sec. 6352),

providing for forfeiture of vehicles used " whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax "? This section is not a liquor law, but applies to all taxed articles. * * *

The specific intent to defraud the United States of the taxes is, however, an essential element of the penalized acts, and must be both alleged and proved whether in a criminal prosecution or a libel for forfeiture. R. S. Sec. 3333 (Comp. St. Sec. 6130) can not be relied on to shift the burden from the United States, because that section applies only to a claimant of liquors in a proceeding to forfeit them, and not to the claimant of a vehicle in a proceeding to forfeit it. The specific intent to defraud may, however, be shown, and generally must be shown by circumstances. 12 Cyc. 152, 153, 179, 180. Where the natural and probable result of acts intentionally done is to defraud, an intent to defraud is to be presumed; but the presumption may be rebutted by showing the actual absence of such intent. This was held in applying, in a criminal trial, a statute in which the specific intent to defraud was made an element of the offense. *Agnew* v. *United States,* 165 U. S. 36, 50. * * *

In the present case the whisky was subject to a tax of $6.40 per gallon, and to

seizure for its nonpayment. Any concealment of it or removal of it, with this knowledge, from the place of production, or other place where it was liable to be seized, with no intention to pay the taxes, would presumptively be done to defraud of the taxes, for that would be the necessary consequence of the act. If one knows the tax on whiskey is due and unpaid, and not intending to pay it, yet assists in passing the whisky on to a consumer, he must intend to assist in defrauding of the tax. But this imputation of fraudulent intent is not final, for another intent consistent with fair dealing may possibly be shown. If, for instance, it should be proved that the buyer had no cause to believe that the tax was unpaid, or knowing it to be unpaid that the liquor was concealed to escape thieves, or removed because of threatened destruction by fire, and that it was intended to pay the tax before final disposition of the liquor, innocence would be established. *Where the seller or remover is not the distiller who owes the tax and who must know whether or not it has been paid, the inference of fraudulent intent is less obvious; but since the liquors are seizable for nonpayment anywhere and in anyone's hands, any person interested in them has the same sort of motive for concealing or removing them, when he knows the tax to be unpaid, as the distiller has, who personally*

owes the tax. Before national prohibition, removal or concealment with knowledge that the tax was unpaid showed with great certainty an intent to avoid the tax, for no other motive could usually be assigned. The additional motive for concealment and removal raised by the Prohibition Act, although it may be more prominently in the mind, does not exclude the inference of an intent also to defraud of the tax, where there is knowledge that it is owing and no intent to pay appears. Concealment of imported goods on which a heavy tariff is known to be due would not be excused under R. S. Sec. 3450, because the goods in addition were stolen and there was also an intent to escape detection in the theft. There is here no direct evidence of actual intent, good or bad. It is fair to infer that the persons using the car were taking part by wholesale in the general traffic of producing, transporting, and selling liquors in defiance both of the Prohibition and Revenue Laws, and that the intent to avoid both punishment and tax was present in all who knowingly participated in it.

The circumstances in this case justify and require condemnation of this car. The innocence of the claimant does not save it. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505. (Italics ours.)

V

Question Four

In the State of Washington, where there is no place where intoxicating liquor can be legally kept without the tax thereon being paid or otherwise, can an automobile be said to have been guilty of being used for the removal, deposit, or concealment of intoxicating liquor with intent to defraud the Government of the tax imposed thereon, where it is merely shown that the liquor is found in the automobile and that no tax thereon has been paid?

We maintain that the reply to this question should be in the affirmative. Whether the laws of the State of Washington allowed a liquor business of any kind would not be material in determining the tax liability of the illicit distiller to whose commodity the Federal tax lien attaches at the moment of its production and follows it until the tax is paid or the liquor seized and destroyed.

VI

Question Five

Did the prosecution of the driver of the car under the national prohibition act constitute an election by the Government to proceed under section 26 of that Act and thereby prevent the forfeiture of the car under section 3450 of the Revised Statutes of the United States?

This would at first seem to be a troublesome point, because there is a sharp conflict of decisions as to what is the extent of the application of the words in Section 5 of the Supplemental Act that—

> if any act is a violation of any of such laws and also of the National Prohibition

> Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

But we believe that Congress had in mind extending the protection in the above guaranty of only one penalty to *persons* who might be subjected to the injustice of a series of trials and punishments for the same offense. That must have been the reason that Congress chose to say that a "*conviction*" would be a bar to further "prosecution." Those words refer to criminal cases, and must surely be meant to be a mandate to the United States Attorney when he exercises his choice of statutes under which to prosecute persons who violate several liquor laws. The contention, therefore, of counsel for claimants is without merit, because the United States Attorney in the Port Gardner case did not prosecute either the driver or the vehicle *twice,* nor did he attempt to do so. True, he might have prosecuted the driver under Section 3450, or possibly under Section 3296, Revised Statutes, if his proof was sufficient (and it is conceivable that it might not have been; he might have lacked some identification evidence against the driver which would not be lacking against the vehicle). But whatever his reasons, which this record does not disclose, he did choose to prosecute the person involved under the statute with lighter penalties, and condemn the *res* through the harsher statute. The two cases were entirely distinct. One

was a civil proceeding against the automobile, the other a criminal prosecution of a person.

Claimants' argument would be entitled to consideration only if their premise were sound, to wit, that the driver having been convicted under the National Prohibition Act the car itself was thereby convicted under Section 26 of that act, and hence recourse to another statute might not be had. But the conviction of the driver does not necessarily convict the car.

The car is not forfeited until an order to that effect is entered. No such order was here asked for or entered. Had this been a case of mere transportation, without the Government being able to prove that the car was also being used to remove liquor in defraud of a tax, such an order would no doubt have been asked for and entered. From the time of arrest of the driver, however, the car was still in the custody of the Government under seizure, with storage charges piling up, and it could be proceeded against under any statute warranted by the facts. Having been used to remove, deposit, and conceal liquor with intent to defraud of a tax, it was subject to forfeiture under Section 3450, irrespective of any other applicable statute. As said by Judge Hutcheson in *United States* v. *One Ford Automobile,* 292 Fed. 207, 210-211:

> It must be conceded that the intention of Congress has now been plainly manifested to in no manner limit or affect the enforce-

> ment of any statutes applicable in their terms, whether passed under the theory of customs regulations, or internal-revenue legislation, unless and except in the very precise point wherein these acts differ from the National Prohibition Act, and that it has clearly expressed its purpose to make effective all of the statutes not expressly repealed where by their terms they are capable of being given effect.

In *The Cherokee*, 292 Fed. 212, the same judge said, p. 215-216:

> I am of the opinion, as stated in the One Ford Automobile Case, that section 26 properly interpreted may be given application to those cases where the seizure is made because of the offense of transporting or possessing liquor, and that where that is the only ground of the seizure alleged or proved, section 26 is controlling. That where the seizure is made on other grounds, and those grounds are established by proof, the government has the right to invoke the forfeiture provided in the statutes controlling those grounds, and section 26 can not be relied upon for protection.

And in *United States* v. *One Bay State Roadster*, 2 F. (2d) 616, Judge Thomas said, p. 622:

> Therefore, as it appears to me, the real test and the deciding factor in each case will be whether or not the government brings the car within the provisions of section 3450. Were the goods liable to a tax?

> Were they removed, or deposited, or concealed with intent to defraud the United States of such tax within the purview of the provisions of section 3450? If the answer be in the affirmative, the vehicle is subject to forfeiture, as section 3450 applies in such a case, and if the answer be in the negative, and the charge is one of unlawful transportation, then section 3450 does not apply and the proceedings should be under the provisions of section 26 of the National Prohibition Act.

The Government believes that if the facts of a case bring it within the provisions of Section 3450, it is its duty to proceed thereunder and that of the courts to decree a forfeiture of the offending thing. This can work no undue hardship on owners or lienors who put their vehicles at the disposal of those who would be likely to use them in liquor transportation. The necessity which Congress saw in 1866 for forfeiting vehicles used in defrauding the Government of revenue is much greater in these days of rapid automobile transportation, which renders easy the traffic in liquor and more difficult the apprehension of the violator. Every citizen is charged with some measure of obligation to assist in enforcing the law. It is not unreasonable to require an owner so to use his property as will best aid the Government in law enforcement and to penalize him if he facilitates the violation of the law by voluntarily entrusting his property to an-

other for a consideration. If he places his property beyond his own control, he runs the risk of the loss of same by destruction from one cause or another. Against such danger he may protect himself as he sees fit, and for losses sustained he has his action against the party responsible therefor, a fact which counsel seem to ignore. If the party dealt with be financially irresponsible, that is a matter to be considered when he entrusts him with the property, or when he drafts the terms of the conditional sales contract.

The facts in this case show not only that Neadeau transported liquor, but that he removed, deposited, and concealed untaxpaid liquor in his car. The purchase of the liquor upon the highway, the fact that it was "moonshine," and all the surrounding circumstances, were sufficient to warrant a jury in finding that an intent to defraud the Government of a tax existed, and that the Government was justified in proceeding as it did under Section 3450. This is not a case of a stolen car, or of an innocent man having been employed to haul liquor, or some other situation where no evasion of the revenue laws could be imputed to the driver or owner, but that of a bootlegger knowingly transporting, depositing, and concealing untaxpaid liquor in his car.

The Government submits that inasmuch as the liquor was untaxpaid, two laws were violated, namely, Section 3450, Revised Statutes, and Sec-

tion 26 of the National Prohibition Act; that these laws do not conflict, but are consistent with each other; that conviction under one did not bar procedure under the other; and that the Government had the right to elect to proceed under either.

CONCLUSION

Opposing counsel in this case concede that questions one and two should be answered in the affirmative, with the qualification, however, that the words "transportation" and "removal" are not synonymous and that illicitly manufactured liquor is not taxable. The Government submits that all the questions should unqualifiedly be answered "Yes," except question five, which should be answered "No."

Respectfully,

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER,
Special Assistant to the Attorney General.

DECEMBER, 1925.

○

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1926.

Port Gardner Investment Co., *vs.* United States of America.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 23, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

This is a proceeding, commenced in the federal court for western Washington, Northern Division, under Revised Statutes of the United States, § 3450, to forfeit an automobile on the ground that it was being used with intent to defraud the United States of the tax on distilled spirits found therein. The use alleged was in removal and for the deposit and concealment. The claimant intervened in the district court, asserted title to the automobile and denied knowledge or notice, prior to the seizure, that the automobile was being used or was to be used in any illegal manner. The case comes here on certificate from the Circuit Court of Appeals for the Ninth Circuit, that court having heard the case on writ of error to the district court, which had entered a decree of forfeiture. Six questions are presented by the certificate. The fifth is: "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the government to proceed under § 26 of that Act and thereby prevent the forfeiture of the car under § 3450 of the Revised Statutes of the United States?"

The facts are these. Neadeau, the driver of the automobile seized by prohibition agents, had been charged with possession and transportation of intoxicating liquor in violation of the National Prohibition Act. He pleaded guilty to both charges and was sentenced to pay a fine. The claimant insisted that this proceeding under § 3450 would not lie. In addition to the objections considered in *United States* v. *One Ford Coupe Automobile*, decided this day, the claimant contended that the Government should not

prevail, because the plea of guilt followed by the sentence constitutes a prior conviction under § 5 of the Willis-Campbell Act, which provides that "if any act is a violation of" any tax law concerning intoxicating liquors and also of the National Prohibition law, or the supplement thereto, "a conviction for such act or offence under one shall be a bar to prosecution therefor under the other." The argument is that under § 26 no separate action is taken to forfeit the vehicle; that forfeiture is an incident of the conviction of the person which operates as a forfeiture also of the vehicle taken possession of, subject only to the right of the innocent third party to establish his lien or other interest; and that the order of sale is merely a step in the execution of the judgment of conviction and forfeiture. It is argued further that the term "act", as used in § 5, means transaction; and that for this reason, independently of the doctrine of election, a conviction of the person under § 26 will bar the proceeding under § 3450 because, on the facts recited in the certificate, the proceeding to forfeit under § 3450 rests upon the same transaction for which Neadeau was sentenced. Whether the principle embodied in this contention is sound we need not determine. For there is another ground on which the conviction of Neadeau under § 26 bars a proceeding to forfeit under § 3450.

The disposition of the automobile prescribed in § 26 became mandatory after Neadeau's conviction; and being inconsistent with the disposition under § 3450 necessarily precluded resort to proceedings under the latter section. Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.

We need not determine whether the mere commencement of a proceeding under § 26 constitutes an election. Nor need we give specific answers to the other questions asked, since the certificate does not disclose any reason why the sale of the automobile, subject to the interests of innocent parties, should not have been ordered by the District Court after the conviction of Neadeau.

Yes, to Question 5.

A true copy.

Test:

Clerk, Supreme Court. U. S.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1926.

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Mr. Justice Butler, concurring.

I agree that the answer to question 5 should be in the affirmative.

In the opinion it is said, "Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative." This means prosecution and conviction of the driver constitute an election to proceed against the vehicle under § 26 and prevents forfeiture under § 3450. The answer is enough to guide the Circuit Court of Appeals in this case. But it leaves open the question which is not decided in No. 115. The substance of that question is whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of § 26 to proceed against the vehicle as there directed. I think he has no more right to ignore that command than he has to let the liquor and offender go. The law makes the election. I regret that this Court's answer is so qualified and restricted. Section 26 is not so restrained.

I am authorized to say that Mr. Justice Stone concurs in this opinion.